Department of Energy
Idaho Operations Office
850 Energy Drive
Idaho Falls, Idaho 83401-1563

December 14, 2001

Dirk Kempthorne, Governor of Idaho
Office of the Governor
700 West Jefferson, 2nd Floor
Boise, Idaho 83720-0034

SUBJECT: Elevation of IDEQ Memorandum Decision and Order dated July 23, 2001, to the Governor of Idaho for Resolution – (EM-ER-01-200)

Dear Governor Kempthorne:

On July 23, 2001, the Idaho Department of Environmental Quality (IDEQ) issued a Memorandum Decision and Order (MDO) pursuant to paragraph 9.2(f) of the 1991 INEEL Federal Facility Agreement/Consent Order (FFA/CO). The MDO states that, following consultations with the Environmental Protection Agency (EPA), the IDEQ decided to deny the DOE's February 26, 2001, request for deadline extensions for three milestones regarding the Pit 9 Record of Decision (ROD). EPA and IDEQ agreed to extend DOE's time for elevating the dispute until December 15, 2001. All parties have agreed to implement the Glovebox Excavator Method to retrieve waste and soil from a 20x20 ft. area of Pit 9 and to deadlines and milestones for that retrieval. The Department is moving forward aggressively implementing the retrieval. Negotiations to resolve the remaining issues in dispute are ongoing; however, as the deadline to elevate the dispute approaches, we now elevate the dispute for your resolution in accordance with paragraph 9.2(f) of the FFA/CO.

Paragraph 9.2(f) of the FFA/CO authorizes IDEQ, as the lead agency for Waste Area Group 7, to issue a "written position" on the dispute if the Senior Executive Committee fails to achieve a consensus resolution to a dispute. The FFA/CO does not authorize IDEQ to issue a unilateral order to any other Party to the FFA/CO such as the order at page 18 of the MDO. The Order seeks, without agreement of all parties, to amend the FFA/CO to create new remedial action primary documents and new deliverable. The Order is not part of the dispute resolution process and has no jurisdictional basis.

Further, DOE strongly disagrees with the assertion in the MDO that the 1995 Settlement Agreement provides for the removal of buried transuranic waste from the State of Idaho. Although the 1995 Settlement Agreement requires removal by 2018 of about 65,000 cubic meters of transuranic waste that has been stored at INEEL for some time, it does not address buried transuranic waste. The buried transuranic waste is subject to remedial action under the CERCLA/Superfund statute and the FFA/CO entered into by DOE, EPA and the State of Idaho.

The central issue of this dispute remains DOE's request for deadline extensions for three Pit 9 Record of Decision deadlines. Mr. Allred's determination that no good cause exists for any extension is incongruent with a joint EPA/IDEQ letter, dated May 23, 2001, and signed by Mr. Allred, that indicated both parties' willingness to agree to a reasonable extension of deadlines. DOE remains steadfast that good cause exists for schedule extensions to the Pit 9 ROD.

On behalf of the Secretary of Energy and pursuant to paragraph 9.2(g) of the FFA/CO, I request that you meet and confer with the EPA Administrator and the Secretary of Energy to discuss the issues in dispute prior to issuing a final decision.

The enclosed position paper provides a more detailed response to the MDO that sets out the complexity of the issue and the positions DOE has taken in the discussions with both IDEQ and EPA concerning the remediation of Pit 9.

Sincerely,

Mark W. Frei
Acting Manager

Enclosure

cc: Administrator, EPA
Secretary, DOE
Administrator, EPA Region 10
Director, Idaho Department of Environmental Quality

DOE Position Paper

1. Unauthorized Order.

Paragraph 9.2(f) of the Federal Facility Agreement and Consent Order (FFA/CO) authorizes IDEQ, as the lead agency for Waste Area Group 7, to issue a "written position" on a dispute if the Senior Executive Committee fails to achieve a consensus resolution. However, the FFA/CO does not authorize IDEQ to issue a unilateral order to other parties to the FFA/CO.

The Order, on page 18 of the Memorandum Decision and Order (MDO), seeks, without agreement of the other parties, to amend the FFA/CO to create new deliverables and deadlines. Since there is no provision in the FFA/CO that authorizes such a unilateral order and the order is not part of the dispute resolution process, IDEQ has no authority to impose the requirements contained in the order.

2. 1995 Settlement Agreement

DOE disagrees with the IDEQ's assertion in the MDO that the 1995 Settlement Agreement governs buried transuranic waste. The 1995 Settlement Agreement does not address buried transuranic waste. Section B.1. of the 1995 Settlement Agreement states:

> *DOE shall ship all transuranic waste now located at INEL, currently estimated at 65,000 cubic meters in volume, to the Waste Isolation Pilot Plant (WIPP) or other such facility designated by DOE, by a target date of December 31, 2015, and in no event later than December 31, 2018.*

The precedence of the CERCLA process over the 1995 Settlement Agreement is reaffirmed by the language of Section G.1 of the Agreement, which states:

> *INEEL Environmental Restoration Program to Continue. DOE shall continue to implement the INEL environmental restoration program in coordination with Idaho and EPA. Such implementation shall be consistent with the schedules contained in the Federal Facilities Agreement and Consent Order (FFA/CO) entered into with the State of Idaho, EPA and DOE, and it shall include schedule requirements developed pursuant to the completed and future Records of Decision under the FFA/CO. The sole remedies for failure to implement the environmental restoration activities specified in the FFA/CO shall be those specified in the FFA/CO.*

The estimated volume of all transuranic waste that has been placed in aboveground storage at INEEL since 1970 is approximately 65,000 cubic meters. It is clear that the intent of the provision in section B.1. is to ship the 65,000 cubic meters of transuranic waste in storage.

The buried transuranic waste is subject to remedial action under the Comprehensive Environmental Response, Compensation, and Liability Act statute (i.e., Superfund) and the 1991 FFA/CO.

DOE's position that the 1995 Settlement Agreement does not apply to buried waste has not changed from the negotiation of the Agreement through the present time. In addition to specific language in the 1995 Settlement Agreement (quoted above), there are two other facts that

substantiate DOE's position that the remedial action at the Subsurface Disposal Area is not subject to the Settlement Agreement.

a. The 1995 Settlement Agreement was an agreement between the State of Idaho, the US Navy, and DOE, and did not include EPA. However, under CERCLA Section 120, the Administrator of EPA has final remedy selection authority at federal facilities listed on the National Priorities List, including the INEEL. The Settlement Agreement could not restrict EPA's remedial action authority as EPA is not a party to it.

b. The FFA/CO can only be amended "by unanimous agreement of the Parties . . . and shall be incorporated into" the FFA/CO itself (Part XXX of the FFA/CO). Since EPA was not a party to the 1995 Settlement Agreement, the agreement could not amend or restrict decisions made under the FFA/CO.

For these reasons, the1995 Settlement Agreement cannot preempt the CERCLA remedial action process at Pit 9, or at any other part of the Subsurface Disposal Area.

3. Assertion that DOE did nothing to retrieve buried waste between 1970 and 1991.

An assertion is made in the second paragraph of page 3 of the memorandum:

"During the next twenty years nothing was done to meet this promise."

DOE began a series of actions to understand the condition of the buried waste in September 1971. The actions described below are only part of the effort to develop an appropriate remedial approach to the entire Subsurface Disposal Area.

Since 1970, the DOE and its predecessor agency, the Atomic Energy Commission, have performed three substantial excavation and retrieval operations inside the Subsurface Disposal Area. During each of these operations additional information and experience was gained about the conditions of wastes buried in various pits for differing amounts of time, in different types of packaging, using various stacking techniques. The three retrieval operations occurred in 1971, 1974-1978, and 1976-1978.

It was through these retrieval operations that the Department of Energy gained a better understanding of, and appreciation for, the difficulties and expense associated with safely excavating and retrieving transuranic waste from the SDA.

4. Relationship between the Pit 9 ROD and the WAG 7 RI/FS and ROD.

Throughout the MDO, IDEQ has clarified its position regarding the relationship between the Operable Unit 7-13/14 Remedial Investigation/Feasibility Study and the OU 7-10, Pit 9 Interim Action. A number of the views expressed by IDEQ are the basis for serious DOE concern because of the potential and fundamental implications for carrying out a successful RI/FS process.

On a number of occasions the MDO states the view that "DOE must fulfill the objectives of the Pit 9 ROD to demonstrate retrieval and treatment so as to apply them in the remainder of WAG 7. I emphasized that the State's objective was for buried transuranic waste to be retrieved and treated." Similar language is used throughout the MDO. For clarification, the RI/FS is being performed consistent with the National Oil and Hazardous Substances Contingency Plan (NCP),

40 CFR Part 300. The RI/FS will include full and fair evaluation of a range of remedial alternatives that may be selected as a preferred alternative in the OU 7-13/14 ROD. Of course, the retrieval and treatment option will be among the alternatives. Consistent with the NCP, the preferred alternative for addressing OU 7-13/14 contaminants of concern will be identified by performing the required evaluation against the nine criteria established under CERCLA and in consultation with the public through issuance of the proposed plan. The language in the MDO implies that IDEQ has predetermined that retrieval is the required remedial option for the Subsurface Disposal Area, contrary to the requirements of NCP and EPA's authority under CERCLA Section 120.

Another fundamental issue in the MDO is the IDEQ view that OU 7-10 performance and data are prerequisites for performance of the OU 7-13/14 RI/FS. IDEQ states: "Another problem with DOE's current request for extension is that it has disconnected the Pit 9 Interim Action Demonstration Project from the overall Remedial Investigation and Feasibility Study for the SDA (WAG 7 RI/FS)." It should be noted however, that the 1998 RI/FS Work Plan Addendum was based on a parallel but independent path for OU 7-13/14. As IDEQ is aware, and as the 1998 Addendum states, because of Pit 9 schedule delays, the agencies "devised an alternate strategy [for OU 7-13/14] that is not dependent on information from Pit 9." The current RI/FS activities are going forward consistent with that strategy and are designed such that the RI/FS will not depend on data from OU 7-10. It appears IDEQ is now interested in modifying this strategy by re-establishing a dependency between the OU 7-13/14 RI/FS activities and performance of OU 7-10.

5. Significance of the Stage II Deadline

Footnote 1 of the MDO, at page 6, incorrectly describes the Stage II Remedial Action (RA) Report deadline that is at issue in this dispute. IDEQ asserted that the prior deadline of the end of April 2003 required the submittal of the RA Report "at the conclusion of this demonstration stage." According to the 1998 Explanation of Significant Differences (ESD), under "Schedule" beginning at page 4, "The milestones shown in table 2 [of the ESD] were established in the Remedial Design/Remedial Action Scope of Work," issued in 1997, and that document in turn describes the Stage II RA Report to be delivered in April 2003 as a report on the project at the point when it first becomes operational, as distinct from the later conclusion of operations (see page A-11).

6. Honoring Agreements and Acting Collaboratively

Since signing the FFA/CO in 1991 with its partners EPA, and the State of Idaho, DOE has been diligent in meeting the milestones in that document. The INEEL's cleanup program is one of the most successful in the DOE complex, having met 102 milestones, while missing just three. As partners in the cleanup of the INEEL, the EPA and Idaho have publicly touted the success of their combined efforts and the effectiveness of the FFA/CO during numerous public meetings. As such, DOE objects to the following statement in the MDO:

> "During the entire course of the Pit 9 project, DOE has not honored its agreement or acted in the collaborative manner that has enabled us to achieve successful results elsewhere at the INEEL."

All agreements on the Pit 9 project were made in concert with the regulatory agencies. Resolution of challenges associated with the remediation of Pit 9 will require the continued collaboration of the three agencies as partners in cleanup.

7. DOE has Acted in Good Faith.

DOE delivered the design for a system to retrieve a 20x20 area of Pit 9 on schedule in June 2000. That retrieval system design meets all the requirements for containment and characterization that the agencies requested and concurred in. DOE informed the agencies at the time of delivery that the system was complicated and could not be built, fielded and operated within the regulatory schedule agreed to before the design was developed. The agencies accepted the design. DOE has acted in good faith to provide alternatives that would address IDEQ's concerns and which could reduce the retrieval activity schedule. DOE, EPA and IDEQ have recently reached consensus on the Glovebox Excavator Method (GEM) alternative, which will significantly reduce the need for a substantial deadline extension, which has been the subject of the present dispute. Seven new deadlines for the GEM alternative will replace the April 2003 Stage II deadline. DOE is also acting in good faith to provide the Remedial Investigation/Feasibility Study for the entire Subsurface Disposal Area to the agencies by the March 2002 milestone.

File:
EM-ER-01-200

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CONCURRENCE:

KEH 12/13/01
12/13/01
12/14/01

RECORD NOTES:

1. This letter was written to elevate the IDEQ Memorandum Decision and Order of July 23, 2001, to the Governor of Idaho for resolution.
2. This letter was written by K. Hain (EM/ER) in coordination with P. Dirkmaat (EM), L. Green (EM), J. Lyle (EM) and OCC for signature by M. Frei (M) KEH
3. This letter/memo closes OATS number N/A
4. The attached correspondence has no relation to the Naval Nuclear Propulsion Program.

KHain EM/ER thorkley, 6-1952, 11/20/01, katie200